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No. 95-719

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM GASPERINI,

Petitioner,

VS.

THE CENTER FOR HUMANITIES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

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MOTION OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Pursuant to Rule 42 of the Rules of this Court, the Association of Trial Lawyers of America ("ATLA") respectfully moves this Court for leave to file the accompanying brief as amicus curiae. Petitioner, through counsel, has denied consent to the filing of this brief.

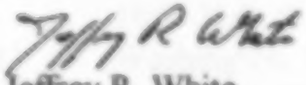
ATLA is a national voluntary bar association whose approximately 50,000 members primarily represent injured plaintiffs in civil actions. The Seventh Amendment protects the right of plaintiffs in federal courts to have their cases decided by the populace in the form of a jury. It also guarantees that jury determinations of facts will not be reassessed by federal judges. To allow judicial reassessment of jury verdicts for no reason other than excessiveness effectively eviscerates the right to trial by jury. When Seventh Amendment guarantees are curtailed or ignored, ATLA believes that we all lose a valuable right.

This case is of special interest to ATLA because it pertains to an integral part of its mission: the preservation of the right to trial by jury. ATLA has participated before this Court as amicus curiae in many significant cases concerning the preservation of Seventh Amendment guarantees. It has done extensive research into the historical roots of the Seventh Amendment and believes that it may be of assistance to the Court, especially as pertains to the historical

underpinnings of the amendment. ATLA brings to the Court a perspective that is shaped by the political philosophy that created the Bill of Rights. This is a perspective that goes well beyond the immediate concerns of the parties involved and targets the authority of both federal district and appellate court judges to review jury verdicts simply on the ground of excessiveness.

For these reasons, the Association of Trial Lawyers of America respectfully moves the Court for leave to file the accompanying brief in this case as amicus curiae.

Respectfully submitted,



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BRIEF OF AMICUS CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONER

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] is a voluntary national bar association of approximately 50,000 attorneys who primarily represent plaintiffs in personal injury, civil rights, and commercial law cases. A motion for leave to file this brief has been filed with the Court.

ATLA is committed to the preservation of the right to trial by jury for those seeking legal redress for injury. The increasing willingness among federal courts to set aside jury verdicts as excessive on the court's view of the weight of the

evidence and comparison with awards in other cases seriously undermines this right. ATLA views this type of excessiveness review as violative of the Seventh Amendment.

SUMMARY OF ARGUMENT

1. The lower court in this case engaged in a type of "excessiveness review" that is particularly offensive to the constitutionally protected role of the jury. Though there was no legal error or passion or prejudice on the part of the jury, the court deemed the award excessive based on its assessment of the weight of evidence, including the credibility of witnesses, and on its comparison of the verdict with awards in other similar cases. This substitution of the court's factual findings for those of the jury, especially when combined with remittitur, clearly invades the jury's province.

While federal courts have long exercized authority to set aside verdicts that were tainted by legal error, this type of reexamination of jury factual findings is relatively recent development. During the past few decades, federal district courts and courts of appeals have become increasingly willing to assume the role of "thirteenth juror," substituting their own assessment of the evidence. Courts have further usurped the jury's function by setting aside as "excessive" verdicts that exceed damage awards in other cases.

2. The Seventh Amendment preserves the role of the jury as it was defined by the common law in 1791. Common law judges had long exercised the authority to set aside jury verdicts that were tainted by misconduct on the part of the jurors.

However, the common law courts had steadfastly refused to set aside verdicts as excessive solely on the basis of the amount of the award, in the absence of a showing that athe jury was motivated by passion or prejudice. *Honda Motor Co. v. Oberg*, which addressed due process requirements imposed on the states by the Fourteenth Amendment, is not

inconsistent with this construction of the Seventh Amendment.

Any uncertainty as to the relationship between judge and jury at common law in 1791 should be resolved in favor of safeguarding the role of the jury.

3. This Court has also looked to the purpose and intent of those who drafted and ratified the Seventh Amendment as a measure of its scope. As the ratification debates make clear, the founders did not view the jury merely as a mode of trial. In their estimation, it was a political institution of vital importance to freedom and self-government.

The founders revered the jury as a bullwark against oppressive government. It represented an important element in the struggle for independence from England. The Antifederalists prevailed in their argument that the civil jury would continue to be necessary to check the power of the national government, particularly that of the federal judiciary.

The founders also viewed the jury as a positive instrument of democracy. The jury box, no less than the ballot box, was seen as an instrument of self-government. The right to sit on civil juries was viewed as an important political right.

ARGUMENT

I. JUDICIAL REVIEW OF JURY AWARDS FOR EXCESSIVENESS INVADES THE PROVINCE OF THE JURY AND UNDERMINES THE INTEGRITY OF THE CIVIL JUSTICE SYSTEM

A. Excessiveness Review Invades The Province Of The Jury.

Amicus addresses the Court solely on the third question presented by Petitioner: Whether the Seventh Amendment permits a federal appellate court to overturn a jury award as

excessive. This Court has not squarely addressed the question of the authority of federal appellate courts to review a denial of a motion to set aside a jury verdict as excessive. Jonathan Massey and Kenneth J. Chesebro, *Challenging Federal Appellate Review of Damage Awards*, Trial 52, 53 (May, 1995).

Amicus submits that the Second Circuit's order in this case was based on a reexamination of the factual findings of the jury in violation of the Reexamination Clause of Seventh Amendment, which provides that:

> no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend VII.

Amicus further suggests that the constitutional question presented in this case cannot be confined to federal appellate courts. Recognizing that the Seventh Amendment's command is addressed to *any* court of the United States, Amicus urges this Court to define the constitutional limits on the authority of federal courts to set aside jury verdicts as excessive.

The jury in this case found the Center for the Humanities liable for the loss of Gasperini's photographic transparencies and awarded damages of $450,000, based on expert testimony as to their value. *Gasperini v. Center For Humanities, Inc.*, 66 F.3d 427 (2nd Cir. 1995). The court of appeals found no legal error, misconduct by the jurors, or evidence that the jury was swayed by passion or prejudice. Rather, the court substituted its own view as to the weight of the evidence and credibility of the expert witness. *Id.* at 429. In addition, the court looked to the amounts awarded in other cases involving the value of transparencies, facts that were not before the jury. *Id.* at 430-31. The court concluded that

the verdict was excessive, warranting a new trial. The court then engaged in its own factual determination that any award totaling more than $100,000 would be excessive and entered an order of remittitur accordingly. *Id.* at 431.

Amicus refers to this type of reexamination of damage awards as "excessiveness review." Its premise is not legal error or passion and prejudice on the part of the jury. It is instead based on the court's own reassessment of the weight of the evidence at trial, including the credibility of witnesses. Characteristically, excessiveness review includes a comparison of the jury's verdict with awards in other comparable cases.

Setting aside the jury's verdict in this manner, amicus submits, represents a serious intrusion into the jury's role as finder of fact. As this Court has observed, "nothing is better settled than that . . . [in] actions for torts where no precise rule of law fixes the recoverable damages, it is the peculiar function of the jury to determine the amount by their verdict." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 16 (1991), quoting *Barry v. Edmunds*, 116 U.S. 550, 565 (1886). Damage issues involve "[c]redibility determinations, the weighing of the evidence, and the drawing of inferences from the facts [which] are jury functions, not those of a judge." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986).

Excessiveness review is frequently coupled -- as it was in this case -- with remittitur. Amicus submits that an affirmative finding by the court of the amount of damages recoverable compounds the usurpation of the jury's function, reducing the jury's role to that of an advisor to the court.

B. Excessiveness Review Has Become Increasingly Common In Federal Courts.

Unfortunately, the lower court's reexamination of the jury's factual finding in this case is not an isolated instance. Surveys of reported decisions demonstrate that, during recent decades, a growing number of federal courts have assumed the authority to grant motions for new trial where the award was deemed excessive solely because of its size, particularly in comparison with comparable awards in other cases. *See* Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation With Suggested Alternatives*, 38 Case W. L. Rev. 157 (1987-88)(survey of federal district court decisions); Eric Schnapper, *Judges Against Juries: Appellate Review of Federal Civil Jury Verdicts*, 1989 Wis. L. Rev. 237) (survey of appellate decisions).

Federal courts have long exercised the power to set aside verdicts that are tainted by legal error, including instances of jury misconduct or passion and prejudice. *See* 6A J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice ¶59.04[1] (2d ed. 1987). In the absence of some indication that the verdict was the product of passion, bias or prejudice or other legal defect, a new trial was not available. *See, e.g., Garzilli v. Howard Johnson's Motor Lodges, Inc.*, 419 F. Supp. 1210 (E.D.N.Y. 1976)($2.5 million verdict for professional singer who was assaulted in defendant's motel was not excessive in the absence of some showing that it was the result of passion or prejudice). It was not enough that the court believed, however strongly, that the amount of the award was too high.[1]

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[1]One treatise states that "[w]hether passion and prejudice may be inferred from the size of the verdict alone is questionable." 6A Moore's Federal Practice, *supra*, at 59-171, citing decisions that require some independent evidence that the jury was improperly swayed. *See Gila Valley, Globe & N. Ry. v. Hall*, 232 U.S. 94, 104 (1914)("if it is apparent to the trial court that the verdict was the result of passion or prejudice, a remittitur should not be allowed, but the verdict should be set aside. In passing upon this question the court should not look alone to the amount of damages awarded, but to the whole case."); *Oklahoma Natural Gas Co. v. McKee*, 121 F.2d 583, 586 (10th Cir. 1941)("In the absence of clear evidence in the record that the verdict was the result of passion and prejudice, this court is without authority to review the amount of verdict in a tort action."); *see also*, Schnapper, *supra*, at 314 n.289.

Rather, the accepted view was that the trial judge "should not set the verdict aside as against the weight of the evidence merely because, if he had acted as trier of the fact, he would have reached a different result." 6A Moore's Federal Practice, *supra*, at 59-149 & n.14 (collecting authorities). In those instances where the verdict has been tainted by passion or prejudice, remittitur has generally been regarded as inappropriate. *Minneapolis & St. Paul Ry. Co. v. Moquin*, 283 U.S. 520 (1930), consistent with the notion that the verdict was legally erroneous, not merely factually incorrect.

In recent decades, however, an increasing number of courts have cast off the restriction limiting them to remedying the effects of a legally tainted verdict and have undertaken a factual review of the jury's damage award. *See, e.g., Brown v. Syntex Labs*, 755 F.2d 668 (8th Cir. 1985)(the district court's determination that the verdict was excessive was properly based on evaluating the evidence and weighing the credibility of the witnesses); *Howell v. Marmpegaso Compania Naviera*, 536 F.2d 1032 (5th Cir. 1976)(the jury's verdict was deemed excessive, warranting remittitur, though the court did not believe the verdict was by passion or prejudice). "Indeed it is declared by some courts that on motion for new trial they sit as a 'thirteenth juror.'" 6A Moore's Federal Practice, *supra*, at 59-164.

The lower court did not infer passion or prejudice from the size of the award in this case. Indeed, resort to such an inference is apparently infrequent, as courts prefer closer scrutiny of the amount of the award, combined with routine use of remittitur to avoid actually having to go through with a new trial. *See* Schnapper, *supra*, at 315-16; Sann., *supra*, at 187-88.

As the case before this Court demonstrates, excessiveness review is not limited to the district courts. One commentator has stated:

> The major controversy in this area of the law concerns whether, if a jury has obeyed the instructions and arrived at a verdict in a fair and unbiased manner, an appellate court can nevertheless direct a new trial merely because the judges believe the jurors made a factual mistake. Today the vast majority of appellate decisions overturning jury verdicts are made on the ground that the jury purportedly made such a good faith error.

Schnapper, *supra*, at 316.

Excessiveness review does not target awards that are so great as to "shock the conscience" of the court. It is clear from the amounts involved in many cases that these courts are simply substituting their own factual findings for the jury's. For example, in *Meehan v. Central R.R.*, 181 F. Supp. 594 (S.D.N.Y. 1960), the court found $315,000 excessive for the wrongful death of 39-year-old and offered plaintiff a remittitur to $235,000. *Compare Knight v. Texaco*, 786 F.2d 1296 (5th Cir. 1986)(affirming remittitur of 17.6% of jury verdict); Sann, *supra*, at 187-88 n.116 (citing examples of remittiturs ranging from 15% to 30% of jury verdict).[2]

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[2]Remittitur, when employed in conjunction with excessiveness review, is particularly unfair to plaintiffs. The notion that plaintiff enjoys a free choice between a new trial and a reduced award is, at best a polite fiction. Injured plaintiffs are often in financial straits precisely because of their injury, so that the cost of delay and the risk of an adverse decision at the hands of the second jury is simply too great. Trial judges, aware of these pressures, probably employ remittutur in many cases where they would not enter a new trial alone. Even if plaintiff opts for a new trial and obtains a similar verdict from the second jury, he or she faces the prospect of yet another remittitur from the court. Additionally,

Courts employing excessiveness review generally arrive at such figures by resorting to verdicts rendered or upheld in other cases. An example is *In re Air Crash Disaster Near New Orleans, La.*, 767 F.2d 1151 (5th Cir. 1985). Following a $1.5 million verdict to the widow of an air crash victim, the trial judge ordered remittitur to $1 million. The court of appeals found that figure was excessive and directed a new trial unless the plaintiff agreed to a remittitur of $500,000. In making this finding, the court made no reference to the evidence in the case, but relied on comparable awards in other cases. Similarly, in *Gaston v. Aqua Slide 'N' Dive Corp.*, 487 F. Supp. 16, 18-19 (E.D. Tenn. 1980), a products liability case, the district court found that the verdict of $1,250,000 for permanent paralysis was "out of line with the verdict in other cases . . . . A reasonable verdict, and one in line with other cases . . . would be $1,000,000." *See also* Sann, *supra*, at 206 n.206 (summarizing decisions evincing similar reliance on other awards).

Reexamining the verdict on the basis of facts that were not presented to the jury is particularly offensive to the jury's role. *See Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109 (4th Cir. 1991)(suggesting that the practice violates the Seventh Amendment); Charles Jared Knight, *State-Law Punitive Damage Schemes And The Seventh Amendment Right To Jury Trial In The Federal Courts*, 14 Rev. Litig. 657 (1995).

In effect, the court treats the jury's decision as advisory, effective only if it falls within the "schedule" of permissible awards represented by the results in prior cases. More fundamentally, the assumption that a limb or a loved one has about the same value for any plaintiff contradicts the principle

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is no corresponding remedy of additur in federal courts. One scholar observes: "For many plaintiffs, this essentially amounts to blackmail, with the verdict being held hostage." Sann, *supra*, at 201.

of individual justice that underlies the jury system. "Such an approach clearly usurps the function of the jury." Sann, *supra*, at 206.

Once the boundary is breached between review for legal taint and overt reexamination of the jury's factual findings, there is little to restrain courts from progressively greater intrusions into the jury's function. "Prior to 1933, the Supreme Court had insisted on at least a dozen different occasions that neither the appellate courts nor the Supreme Court itself had any authority to overturn a jury verdict because it appeared either too large or inadequate." Schnapper, *supra*, at 316 (citing cases). Currently, a majority of circuits "now recognize that they may reverse a judgment even though the only basis for review is the inadequacy or excessiveness of the verdict." Moore's Federal Practice, *supra*, at 59-185.

> [A] large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box.

Schnapper, *supra*, at 354.

Amicus submits that it is precisely this kind of judicial usurpation of the jury's function that the Seventh Amendment was designed to proscribe.

II. EXCESSIVENESS REVIEW VIOLATES THE SEVENTH AMENDMENT.

A. Authority of Common Law Courts to Grant New Trials was Limited to Verdicts Tainted by Legal Error or Jury Misconduct.

Amicus submits that the lower court's excessiveness review, not based on the presence of legal error or passion or prejudice, but on the court's own factual determination of damages, violates the command of the Reexamination Clause of the Seventh Amendment that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

This Court has instructed that "to ascertain the scope and meaning of the Seventh Amendment resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." *Dimick v. Schiedt*, 293 U.S. 474, 476 (1935); *See* Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639 (1973). As it happens, the scope and deference that common law courts accorded to the jury's role as finders of fact reached their apex during that period.

One of the most deeply entrenched principles of the common law was that the assessment of damages in unliquidated claims is the responsibility of the jury. 3 William Blackstone, Commentaries *397. However, the English courts did exercise authority to set aside a jury's verdict and order a new trial.

The progenitor of the new trial order was the writ of attaint. As early as 1202 A.D., that procedure permitted a jury of 24 persons to inquire into whether the petit jury had given a false verdict. If so, the judgment was reversed and the first

jurors were severely punished with forfeiture of all lands and property. Blackstone, *supra*, at *402-05; Lloyd E. Moore, The Jury 58-59 (1973). The punishment of jurors reflected the premise that the jurors had tainted the verdict by misconduct in the nature of perjury. William Forsyth, History of Trial by Jury 152 (Burt Franklin ed. 1971)(1878); E.W. Hinton, *Power of Federal Appellate Court to Review Rulings on Motion For New Trial*, 1 U. Chi. L. Rev. 111, 112 (1933).

By the 16th Century, attaint was no longer in use, having been replaced by statutory fines and imprisonment of jurors who were guilty of misconduct. Imprisoning jurors was outlawed by Act of Parliament in 1667, and finally came to an end after Bushnell's case in 1670. Moore's Federal Practice, *supra*, at 59-74; Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.Q. 579, 583-86 (1993). However, the authority of common law judges to set aside jury verdicts continued to reflect its origin in the writ of attaint, resting on the proposition that juror misconduct tainted the outcome. Lord Eyre explained in 1793:

> The admissibility of the evidence being established, the question of how far it conduces to the proof of the fact which is to be ascertained is not for the Judge to decide, but for the jury exclusively; with which Judges interfere in no case, but where they have in some sort substituted themselves in the place of the jury in attaint on motions for new trials.

Gibson v. Hunter, 2 H. Bl.187, 205 (1793).

B. Common Law Courts Did Not Engage in Excessiveness Review

The first reported grant of a new trial based on the excessiveness of the verdict was *Wood v. Gunston*, 82 Eng.

Rep. 867 (K.B. 1655). Although the opinion did not describe the specific act of misconduct on the part of the jury, the order was based "on the assumption that the jury must have been prejudiced." E.W. Hinton, *Power of Federal Appellate Court to Review Rulings on Motion For New Trial*, 1 U. Chi. L. Rev. 111 (1933). "The statement in the opinion that 'It is frequent in our books for the court to take notice of miscarriages of juries and to grant new trials upon them' probably refers to the misconduct cases." *Id.* at 112.

It is clear that the common law courts did not claim authority to set aside a jury's assessment of damages solely on the judge's conviction that the award was excessive, whether based on reassessing the weight of the evidence or comparing the verdict to other similar awards. In *Beardmore v. Carrington*, 2 Wils. 244, 95 Eng.Rep. 790 (C.P. 1764) the court asserted that "there is not one single case (that is, law) in all the books to be found where the Court has granted a new trial for excessive damages in actions for torts." *Id.* at 249, 95 Eng.Rep. at 793.[3]

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[3]The Court in *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. ___ (1994) declined to accept *Beardmore* for the proposition that English courts *never* set aside verdicts as excessive because common law courts at that time could order a new trial on the basis of passion and prejudice, including cases where damages "may be so monstrous and excessive, as to be, in themselves, an evidence of passion or partiality in the jury." 512 U.S. at ___, quoting *Fabrigas v. Mostyn*, 2 Black.W. 929, 96 Eng.Rep. 549 (C.P. 1773).

Amicus reads the quoted passage from *Beardmore* court as referring to the type of excessiveness review at issue in this case, where there is no passion or prejudice. *See, e.g., Hodges v. Keystone Shipping Co.*, 578 F. Supp. 620, 624 (S.D. Tex. 1983)("The Court concludes that the jury verdict was not the result of passion or prejudice but is beyond the maximum award supported by the evidence.") This interpretation is not at odds with that of the majority in *Oberg*.

This broad rejection of excessiveness review is echoed in *Swain v Hall*, 3 Wils. K.B. 45, 95 Eng. Rep. 924, 925 (C.P. 1770):

> Where verdicts have been given contrary to evidence, or where there hath been no evidence at all to support such verdicts, the Court hath granted new trials; but if there hath been a contrariety of evidence on both sides, the Court hath never granted new trials, notwithstanding the Judge before whom the cause was tried hath been of opinion, that the strength and weight of evidence was against the verdict. . . . although I am still of opinion, that the weight of evidence was with the plaintiff, yet I disclaim any power to controul the verdict of the jury, who are the legal constitutional judges of the fact.

Further indication that common law courts did not claim authority to reexamine jury damage awards for excessiveness is the decision in *Huckle v. Money*, 2 Wils. 205, 95 Eng. Rep. 768 (C.P. 1763), a suit for damages against government agents who attempted to prevent publication of John Wilkes' allegedly seditious pamphlet. Although the damages awarded were great in comparison with the actual harm suffered, the court's reluctance to interfere with the verdict prompted the court to expand the jury's authority to include exemplary damages. *See* Linda Schlueter & Kenneth Redden, Punitive Damages 6-9 (2d ed. 1989)("Lord Camden's recognition of the jury's unfettered discretion in awarding damages was firmly rooted in English legal tradition.")

The relationship between common law judges and juries was clearly defined by 1791: Courts could and did order new trials where the jury had been guilty of misconduct, including

passion and prejudice.[4] But judges lacked authority to substitute their own assessment of damages.

Lord Mansfield once asserted: "Trials by jury, in civil cases, could not subsist now without a power, *somewhere*, to

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[4]This Court's decision in *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331 (1994) does not foreclose this issue. The majority there determined that the common law provided for judicial review of the size of punitive damage awards, and held that Oregon's elimination of such review, even for verdicts tainted by passion or prejudice, violated procedural due process. Id. at 2340-41.

Because *Oberg* addressed the procedural due process obligations imposed on the states by the Fourteenth Amendment, the relevant period of the common law, extended to 1868. Many of the decisions discussed by the Court dated from the 19th Century, including Justice Story's leading decision in *Blunt v. Little*, 3 F.Cas. 760 (C.C. Mass. 1822).

Unhappily, by the mid-19th Century, judges in both England and America had made serious inroads on jury's role, particularly in tort cases, "to better serve the needs of the business elite in an industrializing society." Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 Hastings L.Q. 579, 605 (1993). As the majority acknowledged:

> Judicial deference to jury verdicts may have been stronger in 18th century America than in England, and judges' power to order new trials for excessive damages more contested. See Nelson, The Eighteenth Century Background of John Marshall's Constitutional Jurisprudence, 76 Mich. L. Rev. 893, 904-917 (1978); M. Horwitz, The Transformation of American Law, 1780-1860, p. 142 (1977). Nevertheless, because this case concerns the Due Process Clause of the Fourteenth Amendment, 19th century American practice is the "crucial time for present purposes." *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 611 (1990).

114 S. Ct. at 2342 n.12.

More importantly, "the strictures of the Seventh Amendment" impose more stringent controls on federal courts reviewing damage awards than may be required in state courts. *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, 279 & n.26 (1989); *see also, Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1415 (4th Cir. 1992).

grant new trials." *Bright v. Eynon*, 1 Burrow 390, 3 Bl. Com. 388 (1757). The corollary proposition, was pointed out by a later commentator on that case:

> No one supposed or claimed for one moment, that the English common-law jury could exist under a system of law that allowed an appeal from a verdict of a jury to a bench of judges with affirmative judicial power to find the same fact in issue different from the finding of the jury, albeit on the same evidence.

Henry Schofield, *New Trials and the Seventh Amendment – Slocum v. New York Life Insurance Co.*, 8 Ill. L. Rev. 287, 303 (1913).

C. Any Uncertainty As To the Relationship Between Judge and Jury At Common Law in 1791 Should Be Resolved in Favor of Safeguarding the Role of the Jury.

Unfortunately, we cannot hope to develop a perfect snapshot of the common law as it existed in 1791. The historical record is simply too sparse. Wolfram, *supra*, at 652 n.43. Amicus suggests that the broad presumption this Court has required in favor of the right to trial by jury applies with equal force to the Seventh Amendment's Reexamination Clause:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501, 79 S. Ct. 948, 952 (1959). For that reason, Justice Blackmun advised, "uncertainty in the historical record should lead us . . .

to give the constitutional right to a jury trial the benefit of the doubt." *Granfinaniera, S.A. v. Nordberg*, 109 S. Ct. at 2816 (Blackmun, J, dissenting). "If, in the rare case, a tie-breaker is needed," Justice Brennan once counseled, "let us break the tie in favor of jury trial." *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 110 S. Ct. 1339, 1353 (1990)(Brennan, J., concurring).

III. HISTORICAL IMPORTANCE OF CIVIL JURY REQUIRES BROAD APPLICATION OF THE SEVENTH AMENDMENT PROHIBITION AGAINST JUDICIAL INTERFERENCE WITH THE JURY

This Court has not relied solely on the historical record left by the common law judges of England, but has looked to the understanding and intent of those who framed and ratified the Constitution. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting)("the scope and effect of the Seventh Amendment . . . perhaps more than with any other provision of the Constitution, are determined by reference to the historical setting in which the amendment was adopted.").

That historical context demonstrates that those who fought for preservation of the civil jury did not view it as merely -- or even predominantly -- a method "to assure a fair and equitable resolution of factual issues" in civil cases. *Colgrove v. Battin*, 413 U.S. 149, 157 (1973). As scholars have concluded on the basis of the historical records of the period, the civil jury, and most especially the right to serve on civil juries, was viewed as a political right of immense importance to independence and self-government. *See, e.g.*, Vidram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 Cornell L. Rev. 203, 218 (1995); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History*, 44 Hastings L.J. 579, 595-97 (1993); Alan Howard Scheiner, *Judicial Assessment of Punitive*

Damages, and the Politics of Jury Power, 91 Colum. L. Rev. 142 (1991).

A. The Framers Of The Seventh Amendment Viewed The Civil Jury As An Essential Bulwark Against Oppressive Government.

On Sept 12, 1787, as the Constitutional Convention was nearing the end of its work in Philadelphia, Wilson "observed to the House that no provision was yet made for juries in Civil cases and suggested the necessity of it." On Sept. 15, it was proposed to add to the Article III guarantee of jury trial in criminal cases: "And a trial by jury shall be preserved as usual in civil cases." The motion failed. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289 (Dec. 1966).

The representatives at the Constitutional Convention, however, seriously underestimated Americans' passionate devotion to the institution of the civil jury. This omission, coupled with the grant of appellate jurisdiction to the Supreme Court in Art. III §2, cl. 3 over issues of fact and law, suggested to many that the constitution represented "virtual abolition of the civil jury." Henderson, *supra*, at 295; Wolfram, *supra*, at 672 n.89. This threat to the civil jury very nearly doomed ratification of the entire constitution.

1. The right to trial by jury in civil cases was an important element in the struggle for independence.

In large part, the reverence of Americans for the institution of the jury at this time reflected its role in the recent struggle against oppression by the English crown. They admired the heroism of Edward Bushnell and the other jurors who refused to convict Quaker William Penn in 1670, though they were fined and jailed by the trial judge. *See* John Guinther, The Jury in America ch. 1 (1988)

In 1688, a jury acquitted seven Anglican bishops of seditious libel for signing a letter in opposition to James II. This case elevated the jury in public esteem "as a bulwark of liberty, as a means of preventing oppression by the Crown." Austin Scott, *Trial by Jury and the Reform of Civil Procedure*, 31 Harv. L. Rev. 669, 676 (1918). "Treatises extolling the jury flooded the market and profoundly influenced eighteenth century American as well as English views about jury trial." *Id.*

The civil jury's role in assessing damages in civil cases was also of great interest to Americans. They followed the lawsuits of John Wilkes and his printer against officials bent on preventing his allegedly seditious publication. *Wilkes v. Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763) and *Huckle v. Money*, 2 Wils. 205, 95 Eng.Rep. 768 (C.P. 1763). The court there declined to set aside the large award, recognizing the jury's authority to award exemplary damages. "Wilkes' case and his ongoing conflicts with the British administration were a matter of keen interest in the American colonies. South Carolina went so far as to provide Wilkes monetary support for one of his political campaigns." Landsman, *supra*, at 591. Wilkes' case was cited in debates in support of the need for constitutional protection of the civil jury. *See* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1778-1788, 781-82 (John B. McMaster & Frederick D. Stone eds. 1988)(statement of Robert Whitehall at Pennsylvania ratifying convention).

At the same time, the colonists found themselves frequently deprived of civil jury rights. A primary grievance of the American colonists was the extensive effort by England to shift the adjudication of civil and criminal disputes from colonial courts, where local juries sat, to Vice-Admiralty courts and other non-jury tribunals administered by judges beholden to the Crown. *See* Carl Ubbelohde, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION 209-

11 (1960); Roscoe Pound, THE DEVELOPMENT OF CONSTITUTIONAL GUARANTEES OF LIBERTY 69-72 (1957).

The colonists also faced infringement of the jury's role in assessing damages in civil cases. For example, the anti-federalist Judge Bryan described the civic upheaval that resulted from the reassessment of a jury's damage award by New York's colonial governor:

> The attempt of Governor Colden, of New York, before the revolution to re-examine the facts and reconsider the damages, in the case of Forsey against Cunningham, produced about the year 1764, a flame of patriotic and successful opposition, that will not easily be forgotten.

2 THE COMPLETE ANTI-FEDERALIST 149 (H. Storing ed. 1981).

The colonists complained of these infringements through the Stamp Act Congress, the Continental Congress, and, finally, in the Declaration of Independence. "Because of the jury's power, the British authorities increasingly sought to either control or avoid jury adjudications. The struggle over jury rights was, in reality, an important aspect of the fight for American independence and served to help unite the colonies." Landsman, *supra*, at 596.

2. The adoption of the Seventh Amendment was crucial to ratification of the Constitution.

So highly regarded was the civil jury in the public mind at the time the Constitution was drafted that the absence of an explicit guarantee of civil jury rights was viewed by many as sufficient reason to reject the entire document. Alexander Hamilton observed:

> The objection to the plan of the convention, which has met with most success in [New York], and perhaps in several of the other States, is that relative to the want of a constitutional provision for the trial by jury in civil cases.

THE FEDERALIST No. 83, at 495 (C. Rossiter ed. 1961). Justice Story subsequently recounted that the absence of this guarantee in the proposed Constitution "was pressed with an urgency and zeal, which were well nigh preventing its ratification." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 653 (R. Rotunda & J. Nowak eds. 1987) (1833).

During the ratification debates in the various states, the Antifederalists, repeatedly expressed their fear that, absent some specific constitutional provision to the contrary, the new federal Congress could eliminate jury trials in civil cases in the federal courts. James S. Campbell and Nicholas Le Poidevin, *Complex Cases and Jury Trials: A Reply to Professor Arnold*, 128 Univ. of Pa. L. Rev. 965, 971 (1980); *see, e.g.*, 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 218 (J. Elliot 2d ed. 1836)(remarks of James Monroe at the Virginia ratification convention). Ratifying conventions in seven states adopted resolutions calling for an amendment guaranteeing the civil jury trial. Scheiner, *supra*, at 146.

Ultimately, the antifederalist arguments prevailed on this issue: the Federalists promised the enactment of a Bill of Rights, including civil jury rights, to win support for the constitution. "As soon as the constitution was adopted, this right was secured by the seventh amendment of the constitution proposed by congress; and which received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the

people." *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 445 (1830)

Amicus submits that the great value placed upon the civil jury by the framers warrants broad application of the Seventh Amendment to guard against the erosion of its authority. As Professor Arnold states:

> That special affection for the jury ought to be viewed as relevant not just to the fact that jury trial was "preserved" in the Constitution; it is relevant as well to interpreting the scope of the actual provision, for it gives the right granted an aura, and the Constitution a meaning, they would not otherwise have if the institution of jury trial had been regarded more or less indifferently.

Morris S. Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Cases*, 128 Univ. of Pa. L. Rev. 829, 831 (1980).

B. The Framers Intended the Seventh Amendment As a Check on the Power of the Federal Judiciary.

Independence from England did not diminish the need for civil juries, the Antifederalists argued. The Antifederalists harbored grave fears that the new national government would necessarily fall under the control of a small elite of moneyed interests. There was no question that the unelected, life-tenured federal judiciary would be selected from and would serve that elite. "Judges, unincumbered by juries, have been ever found much better friends to government than to the people. Such judges will always be more desirable than juries to ... those who wish to enslave the people." 3 THE COMPLETE ANTI-FEDERALIST 49 (An Old Whig).

Even well-intentioned judges can pose a danger to the rights of common people, the Antifederalists asserted. They cited Blackstone, who cautioned that judges will frequently have a bias toward those of their own rank. Landsman, *supra*, at 600. The civil jury, therefore, would serve as a bulwark against private as well as public oppression. Scheiner, *supra*, at 152.

The Seventh Amendment stands as a limitation specifically directed at the power of the federal judge. *Granfinanciera S.A. v. Nordberg*, 492 U.S. 33, 83 (1989) (White J. dissenting)("The function of the civil jury is to diffuse the otherwise autocratic power and authority of the judge.") Moreover, the framers clearly expected that "the jury would reach a result that the judge either could not or would not reach." Wolfram, *supra*, at 671; Paul B. Weiss, *Reforming Tort Reform: Is there Substance to the Seventh Amendment*, 38 Catholic U. L. Rev. 737, 747 (1989). And they intended the Seventh Amendment to preserve the jury's right to do so.

On this point, Justice Black, dissenting in *Galloway v. United States*, quoted Patrick Henry, speaking in the Virginia Constitutional Convention:

> Trial by jury is the best appendage of freedom. We are told that we are to part with that trial by jury which our ancestors secured their lives and property... I hope we shall never be induced by such arguments, to part with that excellent mode of trial. No appeal can now be made as to fact in common law suits. The unanimous verdict of impartial men cannot be reversed.

319 U.S. 372, 396 (1943)(Black, J., dissenting).

Amicus submits that to confer upon federal judges the power to "correct" the jury's "mistakes" in assessing damages directly undermines the framers' design.

C. The Framers Viewed Participation in Civil Jury Trials as an Important Exercise in Democratic Self-Government.

de Toqueville astutely recognized that the jury is, above all, a political institution, and it must be regarded in that light in order to be duly appreciated." Alexis de Tocqueville, Democracy in America 293 (Bradley rev.ed. 1945). The role of the jury as an instrument of self-government has been well recognized. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077, 2085 (1991); *Dimick v. Schiedt*, 293 U.S. 474, 485-86 (1934); *Galloway v. United States*, 391 U.S. 372, 397-400 (1943)(Black, J., dissenting); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 338-44 (1979)(Rehnquist, J., dissenting).

In short, the Seventh Amendment was designed to protect not only the civil right to have one's case tried to a jury, but also the political right to serve as a juror. *See generally,* Vidram David Amar, *supra,* at 218.

> In early colonial times, [the jury] was the essential instrument of governance, providing one of the few experiences common to virtually every citizen. In Massachusetts, for example, one historian characterizes the jury as the central instrument of governance. Its wide-ranging activities starkly contrasted with the circumscribed operations of both the royal executive and colonial legislature. William E. Nelson, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975).

Spokesmen on all sides of the ratification debate recognized that the jury box as well as the ballot box were

> fundamental prerequisites to majoritarian self-government. As the state legislators would protect their constituents against oppression by the central government, so too jurors could be expected to "interpose" themselves against the central tyranny through the devices of presentments, nonindictments, and general verdicts. Indeed, the ratification debates abounded with analogies between legislatures and juries. Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 Yale L.J. 1131, 1186, 1188 (1991). Jefferson ventured that "[w]ere I called upon to decide whether the people had best be omitted in the Legislation or Judicial department, I would say it is better to leave them out of the Legislative," quoted in *Id.* 100 Yale L.J. 1188.

The jury role in self-government was all the more critical to the Antifederalists, who viewed the Constitution as an essentially aristocratic document, creating a Congress that would serve the elite and possess "an insufficient sense of sympathy with, and connectedness to, ordinary people." *Id.* at 1140. Popular representation in the judicial branch was needed so that national laws, adopted by persons unfamiliar with local circumstances, would be modified in their application by representatives better acquainted with local needs and customs. Rose, *The Ancient Constitution vs. The Federalist Empire: Anti-Federalism From the Attack on "Monarchism" to Modern Localism*, 84 N.W. U. L. Rev. 74, at 91 (1989). To the antifederalists, the absence of the civil jury "would fatally weaken the role of the people in the adminstration of government." Herbert Storing, WHAT THE ANTI-FEDERALISTS WERE FOR 19 (1981).

In the words of the "Federal Farmer," the leading Anti-Federalist essayist of the ratification period:

> It is essential in every free country that common people should have a part and share of influence, in the judicial as well as in the legislative department...

> The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature... have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of society; and to come forward, in turn, as the centinels and guardians of each other.

2 THE COMPLETE ANTI-FEDERALIST 249-50.

Through the jury, citizens would learn self-government by doing self-government. Akhil Reed Amar, *supra*, at 1196. Alexis de Tocqueville analogized the jury to:

> . . . a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes practically acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even the passions of the parties... I look upon [the jury] as one of the most efficacious means for the education of the people which society can employ. . . .

1A. de Tocqueville, at 295-96. "I do not know whether the jury is useful to those who have lawsuits," he reported, "but I am certain its is highly beneficial to those who judge them." *Id.*

To permit federal judges to reduce jurors in civil trials to the status of tolerated advisors, as the lower court surely did in this case, would deprive Americans of the important role in their government that was intended for them by the Founders.

CONCLUSION

For these reasons, Amicus urges the Court to reverse the order of the lower court in this case.

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